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NO. 86-2053

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN R. AND AUDREY PERTUIT,
Petitioners

versus

THE AMERICAN BANK,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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BACKGROUND

The long saga of this case started on November 12, 1979 when the American Bank obtained a judgment on the merits after a contested trial against John R. Pertuit et als. On a note secured by a mortgage, see Appendix, Item A. The Louisiana Court of Appeal affirmed the judgment in *American Bank v. Red Diamond, et al,* 402 So.2d 729 on July 7, 1981. The Louisiana Supreme Court denied writs stating "Result is correct" on December 14, 1981 in *American Bank v. Red Diamond et al,* 407 So.2d 747 (1981). On June 3, 1985 the Louisiana Court of Appeal rejected a collateral attack in a separate suit on the Bank's judgment, see *American Bank v. Red Diamond et al,* 472 So.2d 155 (1985), and again the Louisiana Supreme Court denied writs on September 27, 1987, see *American Bank v. Red*

Diamond et al, 475 So.2d 360 (1985). This is the third related suit. On July 30, 1985 John and Audry Pertuit filed a "Petition for Writ of Injunction" seeking to enjoin the enforcement of the November 12, 1979 judgment. American's motion for summary judgment was initially denied by the district court, however, on appeal the Louisiana Fifth Circuit Court of Appeals ordered the Trial Court to grant American's motion for summary judgment, see Appendix, Item B, dismissing with prejudice Petitioner's claim. It is this dismissal of Petitioner's claim for injunctive relief that now comes before the United States Supreme Court for review.

There are no facts in dispute. The sole and only remaining issue presented by this case below is set forth in Article V of the Petitioner's First Amending and Supplemental Petition, see Appendix, Item C which states that:

> V. Petitioners aver that the American Bank obtained a judgment against communty property standing in the name of both John R. Pertuit and Audrey Pertuit as a result of a mortgage taken on the property which was signed by John R. Pertuit only. The mortgage was executed in accordance with former Civil Code Art. 2404, which was declared unconstitutional by the United States Fifth Circuit Court of Appeals in *Kirchberg v. Feenstra*, 609 F.2d (5th Cir. 1979), therefore, the judgment based on the mortgage taken pursuant to the former C.C.P. Art. 2004 is null and void with respect to the community property referred to herein.

We respectfully submit that *Kirchberg* is irrelevant to the instant case, and hence, no grounds or reasons exist to grant Petitioner's Writ.

ISSUE PRESENTED

Does the case of *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct 1195, 67 L.Ed. 2d 428 (1981) provide a controlling basis for the Petitioners to prevail on the merits of this case?

ARGUMENT

We respectfully submit and show that there is no legal basis to issue the injunction sought against the enforcement of Respondent's judgment. *Kirchberg* does not provide any such basis.

Petitioners allege that the Bank's judgment is "as a result of a mortgage taken on the property." This allegation is not correct as a matter of law. The Bank's judgment is based upon a promissory note. The Louisiana Court of Appeal which affirmed the Bank's judgment stated the facts as follows:

> On April 4, 1978 plaintiff filed this suit against defendant, Red Diamond Supply Company, Inc. and John R. Pertuit, to recover $94,064, together with interest and attorney's fees, as the holder and owner of a promissory note in the amount sued upon. The note, dated February 11, 1977, was executed by both defendants. Plaintiff also prayed for recognition of: (1) a promissory note in the amount of $33,000 dated October 11, 1971, paraphed for identification with a collateral mortgage of the same date, both executed by defendant John R. Pertuit, and pledged by him to plaintiff; (2) a promissory note in the amount of $50,000 dated September 1, 1976, paraphed for identification with a collateral mortgage of the same date, both executed by defendant, John R. Pertuit, and pledged by him to plaintiff; and (3) a

> promissory note in the amount of $62,000 dated October 11, 1971, paraphed for identification with a collateral mortgage of the same date, both executed by the other defendant, Red Diamond Supply Company, Inc., and pledged by it to plaintiff.

American Bank v. Red Diamond et al, 402 So.2d 729 at 730 (1981). A mortgage is a mere accessory to a principal obligation (See Louisiana Civil Code Article 3284). The bank obtained its judgment upon the note that evidenced the principal debt and has a right to enforce that judgment and is *not* enforcing a conventional mortgage. On the other hand, *Kirchberg* held that a conventional mortgage not signed by both spouses could not be enforced by Louisiana executory process against community property. This has nothing to do with the basic underlying debt, and hence, *Kirchberg* is inapplicable to this case as a matter of law.

The issue of the application of *Kirchberg* to this case has already been finally and squarely adjudicated adversely to petitioners in the first appeal on the Bank's judgment. Judge Samuel, in *American Bank v. Red Diamond, et al*, 402 So.2d 729 at 730, 731 (1981), disposed of the issue thusly:

> Applying these principals to the present case, even if the record indicated the property secured by the collateral mortgages affected immovable property, standing in the name of both husband and wife, the execution of the hand note by the husband alone subsequent to the effective date of the amendment to Article 2334 does not violate that Article as amended. The collateral mortgages were executed at a time when it was acceptable for husband alone to mortgage or otherwise alienate community property, and the fact that the husband executed a hand note subsequent to the effective date of the amendment to Article

> 2334, by which amendment wife's signniture is required to mortgage such property, does not affect the previously recorded and pledged collateral mortgage.

Kirchberg was decided December 12, 1979 (a month after Bank's judgment was rendered by the trial court) and was expressly made prospective only from December 12, 1979; *Kirchberg v. Feenstra*, 609 F.2d 717 at 735 (1979)):

> We apply our decision today prospectively only, because a holding of retroactive invalidity of Article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana.

The United States Supreme Court affirmed on March 23, 1981, which included the prospective aspect of the judgment. Justices Stewart and Rehnquist concurred and stated that:

> While it is clear that the court is correct in holding that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that the court's explicit announcement that its holding was to apply only prospectively means that no other mortgages executed before the date of the decision of the Court of Appeals is invalid by reason of its decision.

Kirchberg v. Feenstra, 101 S.Ct 1195 at 1200 (1981).

Louisiana State Courts have consistently refused to apply *Kirchberg* to any instrument executed prior to December 12, 1979, see; *Ailstock v. Hamitar*, 420 So.2d 500 (La.App. 2d. Cir. 1982), *Cook v. White* 393 So.2d 782 (La.App. 2d. Cir. 1981)(*en banc*), as required by the United States Fifth Circuit in *Kirchberg*.

Petitioners argue that *Kirchberg* is or should be applicable to the instant case. In support Petitioners cite various cases including *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct 1731 (1985). However, nothing Petitioners cite support their claim. For example, *Linkletter* is a criminal case in which the Supreme Court held that the *Mapp v. Ohio* exclusionary rule would not be applied retrospectively. *Linkletter* simply has no relevance to the instant case.

In conclusion, the issue in *Kirchberg,* which speaks to mortgages that are potentially unconstitutional, has no pertinence to a case involving a personal judgment on a promissory note. Also, *Kirchberg's* explicit prospective application renders it inappropriate to the instant case.

CONCLUSION

For the foregoing reasons, American Bank respectfully submits that the Petition for Writ of Certiorari filed by Petitioner's should be denied.

Respectfully Submitted,

_____

_____

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Attorneys for Respondent
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CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of _____, 1987, served three copies of the foregoing brief in opposition upon the following, by placing same in the United States Mail, properly addressed and first class postage prepaid:

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APPENDIX, Item A

AMERICAN BANK	29th JUDICIAL DISTRICT COURT
versus	PARISH OF ST. CHARLES
RED DIAMOND SUPPLY CO., INC. and JOHN R. PERTUIT	STATE OF LOUISIANA
	DIVISION "B"
	NO. 18,925

JUDGMENT

This matter came on for trial this date on its merits upon regular assignment, and there were present:

RADER JACKSON	Attorney for Plaintiff
CHARLES C. WILSON	Attorney for Defendants

When after hearing the pleadings, evidence and oral argument, the Court finds the law and evidence to be in favor of the Plaintiff, for the reasons this day orally assigned, and accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, AMERICAN BANK, and against the defendants, RED DIAMOND SUPPLY CO., INC. and JOHN R. PERTUIT, jointly and in solido, in the full and true sum of Ninety-Four Thousand Sixty-Four and 00/100 ($94,064.00) Dollars, together with ten (10%) per annum interest from August 11, 1977 until paid, twenty-five (15%) per cent attorney's fees on both principal and interest, and for all Court costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public dated October 11,

1971, recorded St. Charles Parish MOB 156, folio 653 be recognized and maintained as security for the plaintiff on the following described property, to-wit:

> THAT PORTION OF GROUNND, together with all buildings and improvements thereon, and all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated on the West Bank of the Mississippi River at Luling, St. Charles Parish, Louisiana, said lot is designed by the NO. EIGHT (8) on a plan of subdivision known as MONSANTO SUBDIVISION as per plan of E. M. Collier, Surveyor, dated December 20, 1957, copy of which plan is on file in the office of the Clerk of Court of this Parish for reference;
>
> Said Lot Eight (8) measuring one hundred fifty-four and 42/100 (154.42') feet front on Oak Avenue and has a depth along its southwesten boundary of Two hundred sixty-nine (269') feet, and a depth along its common boundary with Lot No. 9 of two hundred eighty-three and 08/100 (183.0'8) feet, with a width in the rear or along its western boundary facing the Paul Maillard Road of one hundred forty-five (145') feet.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public dated September 1, 1976, recorded St. Charles parish, Louisiana, MOB 215, folio 292 be and is recognized and maintained and as security for the plaintiff on the above described property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public on October 11, 1971, recorded St. Charles Parish, Louisiana, MOB 156, folio 646 be and is recognized and maintained as secruity for the plaintiff on the following described property, to-wit:

ONE CERTAIN PIECE OR PORTION OF GROUND, together with all buildings and improvements thereon, and all rights, ways, priviledges, servitudes and advantages thereunto belonging or in anywise appertaining, situated in the Parish of St. Charles, State of Louisiana, on the right decenting bank of the Mississippi River, in Section 119, Township 13 South, Range 20 East, and more particularly described as follows:

Said lot of ground begins at a point located on the common line lying between Township 13, South, Range 20 East and Township 14 South, Range 20 East, which is 171 feet east of where the common line between Sections 118 and 119 in Township 13 South, Range 20 East intersects the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East, from which point it extends in a direction running North 33 degrees 58 minutes East for a distance of 240.7 feet; from which point it turns in a direction running South 36 degrees 39 minutes East for a distance of 176.35 feet, where it reaches a point located on the north right-of-way line of U.S. Highway 90; from which point it turns in a southwesterly direction, following the north right-of-way line of U.S. Highway 90 for a distance of 100 feet where it reaches a point where the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East intersects the north right-of-way line of U.S. Highway 90; from which point it thence turns in a westerly direction, following the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East for a distance of 159 feet where it reaches the point of beginning. Said portion of ground conveyed herein is more fully shown on a plan of survey made by Landry Engineering Co., dated New Orleans, Louisiana, August 2, 1967, copy of

which attached to an act of sale by Mrs. Lorna Marie Laque Lauve, et al to Rumsey Rodrigue, passed before George Richard, Notary Public, on December 28, 1967, registered in COB 73, folio 578, St. Charles Parish, Louisiana.

Being the same property acquired by Red Diamond Supply Co., Inc. by purchase from Mrs. Lorna Laque Lauve, et als by act dated February 4, 1969, passed before Charles S. Lagarde, Jr., Notary Public, and duly recorded in COB 86, folio 473, St. Charles, Louisiana.

JUDGMENT read, rendered and signed in open Court at Hahnville, Louisiana this 12th day of NOV, 1979.

/s/ illegible

JUDGE

APPENDIX, Item B

JOHN R. AND AUDREY PERTUIT	:	No. 87-C-6
	:	COURT OF APPEAL
V.	:	
	:	FIFTH CIRCUIT
AMERICAN BANK	:	
	:	STATE OF LOUISIANA

: : :

IN RE AMERICAN BANK APPLYING FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS DIRECTED TO THE HON. RUCHE J. MARINO, JUDGE, DIVISION "C", 29TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. CHARLES, STATE OF LOUISIANA, No. 29-222

: : :

LAWRENCE A. CHEHARDY
CHIEF JUDGE

FEB 9 1987

: : :

ON WRIT GRANTED.

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin and Thomas C. Wicker, Jr.)

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for respondent.

REVERSED AND REMANDED.

Realtor seeks supervisory relief from a denial of its motion for summary judgment in realtor's suit to enforce a judgment against community property. The narrow issue presented is whether *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979), affirmed, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981), applies to this case to preclude enforcement of the judgment against the wife's half of the community property.

The *Kirchberg* decision, which struck down the provision of the Louisiana Civil Code designating the husband as head and master of the community and which gave the husband the exclusive right to administer the community estate, was rendered on December 12, 1979. Realtor's judgment was obtained on November 12, 1979 and was obtained

upon default of a promissory note secured by a mortgage on community property. The note and mortgage were executed solely by the husband some years prior to 1979.

After our review, we find the *Kirchberg* court did not intend its decision to apply to notes and mortgages executed prior to its decision since the court specifically stated that it was to be applied prospectively. See also *Ailstock v. Hamiter*, 420 So.2d 500 (La. App. 2d Cir. 1982). Consequently we find *Kirchberg* does not apply to these facts and relator is entitled to enforce its judgment against both the husband and wife's half of the community property.

Accordingly, the judgment of the trial court denying relator's motion for summary judgment is hereby reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX, Item C

JOHN R. PERTUIT,
ET AL

VERSUS

AMERICAN BANK

29th JUDICIAL
DISTRICT COURT

PARISH OF
ST. CHARLES

NO: 29-222
DIVISION "C"

FILED: January 7, 1986

Dy: Clerk: Lena C

FIRST AMENDING AND SUPPLEMENTAL PETITION

The first amending and supplemental petition of John R. Pertuit, et al, plaintiffs in the above entitled cause, respectfully represents that the plaintiffs desire to amend and supplement their original petition filed herein on the 30th day of July, 1985, in the following respects:

1.

By amending and supplementing paragraph V. as follows:

V.

Petitioners aver that the American Bank obtained a judgment against community property standing in the name of both John R. Pertuit and Audrey Pertuit as a result of a mortgage taken on the property which was signed by John R. Pertuit only. The mortgage was executed in accordance with former Civil Code Art. 2404, which was declared unconstitutional by the United States Fifth Circuit Court of Appeals in *Kirchberg v. Feenstra*, (609 Fed. 2nd. 727, Ct. of Ap. 5th CIr. - 1979), therefore, the judgment based on the mortgage taken pursuant to the former

C.C.P. Art. 2404 is null and void with respect to the community property referred to herein.

WHEREFORE, petitioners, John R. Pertuit and Audry Pertuit, reiterating the prayer of their original petition as set forth at length herein pray that their first amending and supplemental petition be amended and supplemented in the particulars set forth above and that after due proceedings had, there be judgment in their favor and against the defendant, American Bank.

/s/ R. O. Lewis

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